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No. 87-421

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT TERRY BRAVO,

Petitioner,

v.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of
The State of California

BRIEF OF RESPONDENT IN OPPOSITION

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19 pp's

QUESTION PRESENTED

Does a probationer's consensual agreement to submit to warrantless searches as a condition of probation permit a search of his home by officers who suspected he was engaged in narcotics activity?

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OPINIONS BELOW

The unanimous decision of the California Supreme Court reversing the decision of the California Court of Appeal, Fourth Appellate District, Division Three, is published as People v.

Robert Terry Bravo ((1987) 43 Cal.3d 600), and is reprinted in Petitioner's Appendix A.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 United States Code section 1257, subdivision 3.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Fourth and Fourteenth Amendments to the United States Constitution are adequately set forth in the Petition for Writ of Certiorari, page 2.

STATEMENT OF THE CASE

In an information filed by the Orange County District Attorney on June 15, 1982, petitioner was charged with possession of cocaine and possession of cocaine for sale, and possession of a firearm. (CT 44; Cal. Health & Saf. Code, § 11350 & 11351; Cal. Pen. Code, § 12021.)

On September 24, 1982, petitioner's motion to suppress evidence was heard and denied. (CT 68, 71a; Cal. Pen. Code, § 1538.5.)

On January 13, 1983, petitioner pleaded guilty to possession for sale of a narcotic and possession of a firearm by an ex-felon. (CT 89-92.) Petitioner was granted probation on various terms and conditions, including he serve a seven month county jail sentence. (CT 89.)

Petitioner appealed the judgment and on February 26, 1985, the Court of Appeal, Fourth Appellate District, Division Three, in a 2-1 decision reversed petitioner's conviction holding that the specific probation search condition accepted by petitioner did not waive all protection from "unreasonable searches." (Published and cited at 165 Cal.App.3d 741 (1985) (reprinted at 184

Cal.App.3d 1256 (1985) to permit tracking).

Respondent sought review of this decision to the Supreme Court of the State of California. On May 16, 1985, review was granted and on July 9, 1987, the California Supreme Court in a unanimous decision reversed the Court of Appeal and affirmed petitioner's conviction. The California Supreme Court held that a condition of probation that permits search with or without a warrant also permits a search without "reasonable cause" as the former includes the latter. Thus, petitioner's consent to a warrantless search at any time justified the search of his home undertaken by officers who suspected petitioner was engaged in narcotics activity.

STATEMENT OF FACTS

As the relevant facts are set forth in the Opinion of the Supreme Court of

the State of California, respondent adds only the following additional comments.

In 1981 petitioner pleaded guilty to possession of concentrated cannabis. He was granted probation and as a condition of that probation agreed to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant." (RT 75.)

In February 1982 petitioner was still on probation when an anonymous caller stated to the Anaheim Police Department that he was a neighbor of petitioner, who had just moved into the neighborhood, and he believed petitioner was selling narcotics from his home. His suspicions were based on the volume of traffic in automobiles and people in and around petitioner's home. (RT 76-77.) Because the caller feared retaliation he declined to give his name.

(RT 81.) The caller gave the police petitioner's address. (RT 28.)

Detective Manley of the Anaheim Police Department ascertained petitioner's name and received information petitioner was not currently employed. (RT 28.) Upon receipt of this information, he ran a utilities check on the address given by the anonymous caller and discovered the utilities were being paid by appellant. An inquiry into appellant's background revealed appellant was currently on probation. (RT 29, 33-35.) Detective Manley requested and received a certified copy of appellant's probation order which included the condition that petitioner must submit to warrantless searches. (RT 75.)

Prior to receiving a copy of appellant's probation grant Detective Manley set up a surveillance of petitioner's residence on five or seven

occasions. On one occasion he saw numerous cars parked in front of the house. Since there was construction going on at the side of the house, it was difficult to determine whether this foot traffic was related to the reported narcotic activity. (RT 39, 40.)

Detective Manley's last surveillance of appellant's residence was on or about March 18. Although Detective Manley had not observed the volume of foot and vehicular traffic as reported by the anonymous caller, this did not cause him to doubt the veracity of the anonymous tip. He reasonably believed the sudden drop-off in traffic in and out of petitioner's house had occurred because petitioner may have been tipped off about the surveillance. (RT 50-51, 62-63, 65.)

On March 23, 1982, petitioner's residence was searched. Four ounces of cocaine, packaging paraphernalia,

several thousand dollars in currency and gold and three handguns were found in petitioner's house. (CT 75.)

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the Supreme Court of the State of California fully considered and correctly denied the issue at bar finding that defendant consented to the search in question. In so finding the court relied on prior decisions of this Court, including Washington v. Chrisman (1982) 455 U.S. 1 and Schneckloth v. Bustamonte (1973) 412 U.S. 218, which are controlling.

Moreover, this Court's recent decision in Griffin v. Wisconsin (1987) ___ U.S. ___ (97 L.Ed.2d 709) upholding a warrantless administrative search by probation officers of a probationer's residence, that petitioner alleges is in conflict, differs only because California

and Wisconsin differ in their respective probation systems. The California Supreme Court's decision in Bravo is consistent in application of the concepts set forth in previous, controlling decisions of this Court.

ARGUMENT

I

A PROBATIONER'S CONSENT TO SUBMIT TO WARRANTLESS SEARCHES AS A CONDITION OF PROBATION IS A TOTAL WAIVER OF FOURTH AMENDMENT RIGHTS. THUS, A PROBATION SEARCH CONDITION THAT PERMITS A SEARCH WITHOUT A WARRANT ALSO PERMITS A SEARCH WITHOUT "REASONABLE CAUSE" AS THE FORMER INCLUDES THE LATTER.

This Court has recognized that a search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent. (Washington v. Chrisman (1982) 455 U.S. 1, 9-10.) As petitioner acknowledged his consent to be searched without a warrant at any time, the only issue presented below was the

scope of petitioner's consent. The California Supreme Court relying on this Court's decision in Schneckloth v. Bustamonte (1973) 412 U.S. 218, 235-246, applied its reasoning in finding that the strict test of waiver as applied to fundamental trial rights does not apply to a waiver of Fourth Amendment rights. The California Supreme Court's decision, that no balancing of a probationer's privacy interest with the societal interest in public safety is required where the search is conducted pursuant to a consensual probation order, comports with this Court's rationale in Washington v. Chrisman, supra, 455 U.S. at pp. 9-10 and Schneckloth v. Bustamonte, supra, at pp. 241-246.

The strict test of waiver and principles of narrow construction do not apply in determining the scope of a probationer's consent to submit to

warrantless searches. The scope is determined on the basis of an objective and reasonable test. The only objective and reasonable interpretation of a probationer's advance agreement to warrantless searches is a waiver of both probable and reasonable cause. Any other interpretation would render the warrantless search condition, whose purpose is to deter further narcotic related offenses, useless.

II

THE CASE AT BAR IS NOT IN CONFLICT WITH THIS COURT'S RECENT DECISION IN GRIFFIN V. WISCONSIN (1987) ___ U.S. ___ (97 L.ED.2D 709).

California and Wisconsin's analyses of the validity of probation search conditions differ because each reflects differences in their respective probation systems.

The Wisconsin probation search condition, unlike California, is applied

by administrative regulation to all probationers. The conditions provide for warrantless probation searches on less than probable cause. In contrast, California probation is different in that probation search conditions do not apply to all grants of probation. (People v. Johnson (1987) 43 Cal.3d 296, 316, ___ Cal.Rptr. ___; People v. Burgener (1986) 41 Cal.3d 505, 532-533, ___ Cal.Rptr. ___.) Rather the trial court has discretion to impose a probation condition in a particular case if it is determined to be reasonably related to the crime for which the offender was convicted and to the potential for future criminality. (In re Naito (1986) 186 Cal.App.3d 1656, 1661-1662, ___ Cal.Rptr. ___.)

In contrast to the Wisconsin probationer, the California probationer can refuse to accept probation on the

condition proposed, or can challenge the legality of the proposed condition on an appeal from the judgment or on habeas corpus. (People v. Mason (1971) 5 Cal.3d 759, 764, 488 P.2d 630, 97 Cal.Rptr. 302, cert. den. 405 U.S. 1016.) Thus, the probation search conditions take into account: the dual purposes of probation supervision (rehabilitation and deterrence) (5 Cal.3d at p. 763, 766); the reduced expectation of privacy of the defendant conditionally released to society on probation (5 Cal.3d at pp. 764-765); the defendant's consent to the condition when informed of the proposed conditions (5 Cal.3d at p. 766); the propriety of the search condition and its terms, given the nature of the probationer's past criminality and potential for future criminality (5 Cal.3d at p. 764); and limitations on the

manner in which the search condition is carried out (5 Cal.3d at p. 765, fn. 3).

Unlike the Wisconsin probationer, the California probationer accepts probation pursuant to a voluntary agreement by which he waives his Fourth Amendment rights in exchange for release into the community and in order to avoid a state prison term. A probationer's advance consent to submit to warrantless searches dispenses with any requirement of probable or reasonable cause and constitutes a complete waiver of Fourth Amendment rights.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied as his argument fails to recognize the search conducted pursuant to a valid consensual agreement comports with the consent exception to the Fourth Amendment warrant requirement. Moreover, the issue was

fully considered and correctly decided by the California Supreme Court based on prior decisions of this Court, which are controlling.

Dated: November 24, 1987.

Respectfully submitted,

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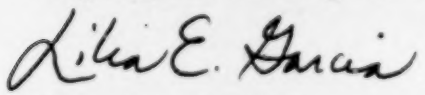

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No: 87-421
October Term, 1987

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

v.

ROBERT TERRY BRAVO
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within
as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Michael Ian Garey
Attorney at Law
611 Civic Center Drive West
Penthouse Suite, 4th Floor
Santa Ana, California 92701

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 25 day of November, 1987.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 25, 1987.

Clifford E. Reed

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 24 day of November, 1987.

Jean M. Burns

Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991